

1
2
3
4
5
6
7 CENTER FOR BIOLOGICAL
8 DIVERSITY,
9 Plaintiff,
10 v.
11 GINA RAIMONDO, et al.,
12 Defendants.

Case No. 22-cv-00117-JD

ORDER RE STAY

12
13 On March 14, 2023, the Court granted summary judgment in favor of plaintiff Center for
14 Biological Diversity (CBD) and concluded that defendants Raimondo and the National Marine
15 Fisheries Service (NMFS) could not “indefinitely delay developing a take reduction plan while
16 continuing to authorize Section 1371(a)(5)(E) permits for the incidental take of endangered and
17 threatened humpback whales.” *Ctr. for Biological Diversity v. Raimondo*, 661 F. Supp. 3d 964,
18 971 (N.D. Cal. 2023).¹ Humpback whales are protected as a listed species under the Endangered
19 Species Act, 16 U.S.C. § 1531 *et seq.*, and under the Marine Mammal Protection Act,
20 16 U.S.C. § 1361 *et seq.* (MMPA). *Id.* at 967-68. The parties subsequently stipulated to a
21 settlement agreement, Dkt. No. 297, which the Court approved, Dkt. No. 298. Among other
22 obligations, the settlement agreement requires NMFS to “issue a notice establishing a take
23 reduction team by October 31, 2025” and hold an initial take reduction team meeting by
24 November 30, 2025. Dkt. No. 297 ¶ 1. NMFS has issued another incidental take permit for
25 humpback whales to the commercial sablefish pot fishery. *See* Taking of Threatened or
26 Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of a Permit,

27
28 ¹ Section 1371(a)(5)(E) of the Marine Mammal Protection Act requires a take reduction plan in
the circumstances presented in this case. *See Raimondo*, 661 F. Supp. 3d at 968-69.

1 89 Fed. Reg. 96,230 (Dec. 4, 2024). The permit states that a take reduction plan for humpback
2 whales “is under development.” *Id.* at 96,232-33.

3 The government asks for a stay of the take reduction plan deadlines because of the lapse in
4 appropriated funds. *See* Dkt. No. 314. The government proposes a stay for the duration of the
5 lapse and suggests that it may seek a further stay even when funding is restored. *Id.* ¶¶ 1, 4, 6. In
6 effect, the government again seeks to delay indefinitely the development of a take reduction plan
7 while it continues to permit the incidental take of humpback whales. CBD opposes a stay.
8 Dkt. No. 315.

9 A stay is denied. To start, the government did not acknowledge or address the controlling
10 standards. A stay is “an exercise of judicial discretion” and “[t]he party requesting a stay bears the
11 burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*,
12 556 U.S. 418, 433-34 (2009) (citations and quotations omitted). “[F]our factors determine the
13 propriety of a stay: ‘(1) whether the stay applicant has made a strong showing that he is likely to
14 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
15 whether issuance of the stay will substantially injure the other parties interested in the proceeding;
16 and (4) where the public interest lies.’” *In re Facebook Biometric Info. Priv. Litig.*, No. 3:15-CV-
17 03747-JD, 2018 WL 2412176, at *1 (N.D. Cal. May 29, 2018) (quoting *Nken*, 556 U.S. at 426).
18 Our circuit has “underscored ‘the bedrock requirement that stays must be denied to all petitioners
19 who did not meet the applicable irreparable harm threshold, regardless of their showing on the
20 other stay factors.’” *Id.* (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011)). In
21 addition, as general rule, “stays should not be indefinite in nature.” *Dependable Highway Exp.,
22 Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citation omitted).

23 The government did not mention, let alone substantively discuss, any of these principles.
24 All it said was that funding has lapsed for NMFS and other agencies, as it has for the federal
25 judiciary, and that NMFS employees “are prohibited from working.” Dkt. No. 314 ¶ 2.

26 But as CBD pointed out in its opposition papers, the Department of Commerce, which
27 houses NMFS, promulgated a “Plan for Orderly Shutdown Due to Lapse of Congressional
28 Appropriations” that implemented several exceptions to keep NMFS functions in operation.

1 See Dkt. No. 315-1 at ECF pp. 63-64. One of the “[e]xcepted functions” includes “[m]onitoring
2 trust resources under the Magnuson-Stevens Fishery Conservation and Management Act, Marine
3 Mammal Protection Act, Endangered Species Act and other authorities to avoid irreparable harm
4 to U.S. fishery or protected species trust resources and taking necessary regulatory action.” *Id.* at
5 ECF p. 63. This exception fits the circumstances here to a T. As the Court concluded in the
6 summary judgment order, NMFS is required to develop a take reduction plan for humpback
7 whales as a necessary action to avoid mortality and serious injury to these protected marine
8 mammals.

9 The government did not mention this exception in its stay request, and the Court directed
10 the government to explain why it should not apply here. Dkt. No. 316. The government’s
11 response, Dkt. No. 317, was unilluminating. The government says that the monitoring exception
12 does not apply because NMFS has elected to use it only to “prevent vessels from exceeding the
13 total allowable catch of certain species where the limit has already been exceeded or soon will be.”
14 *Id.* at 3. This reads the exception to apply only to U.S. fisheries, and ignores the plain language
15 that covers “protected species trust resources.” Dkt. No. 315-1 at ECF p. 63. The government
16 also says that the exception is distinguishable from this case because NMFS has not taken any
17 regulatory action with respect to a take reduction plan for the whales, and has already issued a
18 permit allowing incidental take. Dkt. No. 317 at 3-4. In effect, the government says the
19 monitoring exception does not apply because the government never developed a take reduction
20 plan in the first place.

21 This is circular reasoning. The government’s construction of “monitoring” is arbitrary and
22 self-serving, and wholly at odds with the requirements of the MMPA, the Endangered Species
23 Act, and the Court’s conclusions in the summary judgment order. Overall, the government did not
24 demonstrate that the monitoring exception should be disregarded, and did not otherwise establish
25 good grounds for the indefinite stay it requests.

26
27
28

1 Consequently, a stay is denied. The provisions of the settlement agreement remain in full
2 and active force.

3 **IT IS SO ORDERED.**

4 Dated: October 24, 2025



6
7 JAMES DONATO
8 United States District Judge

12 United States District Court
13 Northern District of California

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28